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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KESAVA BRAEGER,

Defendant and Appellant.

F064333

(Fresno Super. Ct. No. F10904655)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

J. Wilder Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Wiseman, Acting P.J., Levy, J. and Kane, J.

STATEMENT OF THE CASE

On October 7, 2011, appellant Kesava Braeger pleaded no contest to one count of unlawful sexual intercourse with a person under age 16 (Pen. Code,[1] § 261.5, subd. (d)). In exchange for the plea, the court dismissed three other counts of sexual offenses (§§ 261, subd. (a)(2), 288a, subd. (c)(2), 288, subd. (c)(1)) on motion of the district attorney. The written change of plea form signed by appellant indicated that appellant could be sentenced to a maximum term of four years in state prison.

On November 7, 2011, the court suspended imposition of judgment and sentence for three years and placed appellant on three years of formal probation on condition that he serve 360 days in county jail. The court ordered appellant to register as a sex offender (§ 290), instructed him not to "possess or control any dangerous or deadly weapons, including firearms," and further instructed him not to "view, purchase or possess sexually explicit pictures, magazines, video tapes, or movies or computer pornography including those depicting minors engaged in sexual activity or actors representing themselves to be under the age of 18 engaged in sexual activity."

The court also ordered appellant not to "initiate, establish or maintain contact with any minor child or reside with any children without prior [c]ourt order. [¶] [F]requent places where children congregate, such as parks, playgrounds, schools, video arcades, without the prior approval of the [c]ourt or the Probation Officer. [¶] [O]btain employment which would allow unsupervised contact with minors, [or] reside within a 2000 foot radius [of] any school attended by minors." The court imposed a $200 probation revocation restitution fine (§ 1202.44), among other fines and penalties.

[1] All further statutory references are to the Penal Code unless otherwise stated.

On December 5, 2011, appellant submitted a combined notice of appeal and request for certificate of probable cause. On February 3, 2012, the superior court granted the request for certificate of probable cause.

STATEMENT OF FACTS

Because appellant pleaded no contest to unlawful sexual intercourse with a person under age 16, the following facts are taken from November 7, 2011, report of the probation officer.

In early 2008, the 15-year-old Confidential Victim (CV1) visited her friend, 13-year-old Confidential Victim (CV2), while the latter lived with her older sister and the sister's boyfriend, the appellant. CV1 lived in the Sacramento area at the time, and she frequently visited CV2. CV1 had problems with her mother, and appellant befriended CV1 over time. He took CV1 shopping for clothes and took her out to eat. When CV1 moved to Fresno, she stayed in contact with appellant by text messaging.

On December 5, 2008, appellant traveled from Sacramento to Fresno and took CV1 out to eat at a restaurant in the River Park shopping center. He invited her to go to the movies but she declined and asked him to take her home. Appellant instead drove CV1 to a Fresno hotel and refused her further request to take her home. Appellant told CV1 he wanted to have sex with her, but she declined. Appellant then threatened to "destroy her family" if she did not have sex with him. Appellant told CV1 he would call CPS on her mother and have her taken away. At that point, CV1 agreed to go to the hotel with him. Appellant checked them into a room on the top floor, saying "no one would be above them."

Inside the room, Braeger fondled CV1's breasts and told her to orally copulate him. He undressed CV1 and then undressed himself. He told CV1 that their intercourse would have rules, i.e., that she would have to act as though she liked sex and that she would have to call out his name. Appellant then got on top of CV1 and penetrated her. He had sexual intercourse with her for some time, turned her over, and then engaged in

intercourse "from behind." He slapped her posterior, causing red marks and swelling. He also made her stand up against a wall and again engaged in sex "from behind." The intercourse was "rough," and appellant slammed CV1's body against the wall. He next took her back to the bed, placed her on her hands and knees, and engaged in intercourse "from behind." Appellant wore a condom during the incident and then removed it and ejaculated into his hand. After the sexual conduct, appellant told CV1 to dress while he went into the shower. After the shower, he dropped CV1 at home.

Several days after the incident, appellant sent CV1 some text messages, and she told him to leave her alone. CV1 did not see appellant for some time after the incident. On December 25, 2008, CV1 went to the home of CV2 for a visit and felt uncomfortable when appellant arrived with his girlfriend. While CV1 was at the house, appellant told her he wanted to grab her posterior. CV1 eventually left the premises because she did not want to be in appellant's presence. CV1 did not tell anyone about the incident at the hotel and started to "withdraw" from her mother and other family members.

On January 5, 2009, CV1's mother contacted the Clovis Police Department and reported that appellant was threatening CV1. CV1's mother said appellant made cell phone contact with her daughter, and the mother suspected "sex." She confiscated CV1's cell phone and read appellant's threatening text message. At this point in time, CV1 denied any sexual relationship with appellant. Clovis police officers contacted appellant, and he denied any sexual relationship or wrongdoing. He advised officers that CV1 was depressed and said he was concerned for her. He also indicated that he would leave CV1 alone.

CV1's mother contacted officers again and reported that appellant was continuing to contact her daughter. CV1 was also receiving random text messages from someone named "Adam Polson." Polson claimed he knew CV1's friends. CV1 had been in contact with Polson through cell phone texting, and they exchanged photos. CV1 believed that Polson was a school acquaintance, and she exchanged e-mail addresses and

photographs with him. On January 8, 2009, CV1 agreed to meet with Polson at a restaurant in the Sierra Vista Mall in Clovis. When she entered the restaurant, appellant approached and attempted to speak with her. She became frightened, ran away, went home, and told her mother about the encounter.

Officers contacted appellant, and he denied seeing CV1 at the Clovis restaurant. He claimed he had not been in the Fresno area since Christmas of 2008. He later admitted that he was in Clovis and went to the restaurant, but claimed his encounter with CV1was a coincidence. Appellant later admitted he created a false e-mail account under the name of Adam Polson in order to secretly stay in contact with CV1. After the officers spoke to appellant, CV1 received a text message from him stating: " 'Well, I guess I'm going to jail.' " Appellant continued his attempts to contact CV1 by sending her text messages and calling her home. The text messages asked CV1 to " 'meet him' " or to " 'spend the night with him.' " CV1 received one text messaged demanding that she engage in sex with appellant, or he would file a report with Child Protective Services (CPS) falsely claiming that CV1's mother had abused her.

On January 12, 2009, CPS received an anonymous call that CV1 was being abused by her mother, and that CV1 was sneaking out at night, doing drugs, and getting " 'gang-banged.' " The caller claimed that CV1's older brother, age 19, was engaged in a relationship with an underage female and that the minor girlfriend lived at the brother's home. A CPS worker went to CV1's home and interviewed CV1 and her mother but did not find any evidence of abuse.

Sacramento police officers went to appellant's residence in that city and contacted him about the incidents alleged by CV1. Appellant denied attempted contacts with CV1. Officers looked at the list of appellant's recent phone calls and determined that he had made the calls to CPS and had been calling CV1'shome. Officers confiscated appellant's computers and located pornographic videos depicting children as young as seven years of age engaging in sexual intercourse. One computer file consisted of a video of CV2

taking a shower and changing into clothes. Officers determined the videos were recorded with a hidden camera and depicted appellant's bathroom and a room in the house where CV2 stayed when she visited her older sister and appellant. Officers arrested appellant and took him to Sacramento County Jail for having child pornography in his computer and for recording CV2 while she was fully nude.

In May 2009, CV1 contemplated suicide, owing to emotional problems arising from the incident with appellant. On May 11, 2009, she was admitted to the Fresno County Health PAC Unit for an evaluation under Welfare and Institutions Code section 5150. She told staff psychologists that she had been raped and had been using crystal methamphetamine. CV1 wrote her mother a letter stating, " 'I was raped,' " and expressing an intent to commit suicide. CV1 then told her mother about appellant raping her in December 2008. Officers contacted CV1, and she said she did not report the 2008 incident because she was afraid of appellant. She decided to report the incident after learning that he had been incarcerated in Sacramento County on child pornography charges.

DISCUSSION

THE IMPOSITION OF CONDITIONS OF PROBATION

Appellant contends the trial court erred by imposing certain conditions of probation at sentencing. We address each challenged condition in turn.

A. Prohibition Against the Possession and Viewing of Sexually Explicit Materials

Condition 38 of appellant's probation stated:

> "38 Do not view, purchase or possess sexually explicit pictures, magazines, video tapes, or movies, or computer pornography including those depicting minors engaged in sexual activity or actors representing themselves to be under the age of 18 engaged in sexual activity."

Appellant contends: "Because the phrase 'sexually explicit' has no set meaning, and [has] several conflicting definitions within the law, the term of probation imposed upon Braeger infringes his First Amendment rights because it is impermissibly vague and overbroad." He specifically contends the First Amendment protects sexually explicit materials that have societal value, the prohibition against possession of such materials is overbroad and vague, the prohibition against such possession of materials depicting adults is vague, and the probation condition lacks a necessary knowledge element.

"Section 1203.1 gives trial courts broad discretion to impose conditions of probation to foster rehabilitation of the defendant, protect the public and the victim, and ensure that justice is done. [Citations.] 'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality...." [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.' [Citation.] As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]" (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702.)

Conditions of probation must be narrowly drawn, and must also be sufficiently precise for the probationer to know what is required of him or her. The courts must be able to determine whether the condition has been violated. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) A trial court has "broad discretion" to prescribe probation conditions in order to foster rehabilitation and protect public safety. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750.) However, such conditions may be challenged for being unconstitutionally overbroad and vague. (*Ibid.*) A probation condition may be overbroad "if in its reach it prohibits constitutionally protected conduct. [Citation.]"

(*Ibid*.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.]" (*Sheena K., supra,* 40 Cal.4th at p. 890.)

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as constitutionally overbroad. [Citation.]" (*Sheena K., supra,* 40 Cal.4th at p. 890.) A reviewing court is authorized to modify conditions of probation when necessary to correct such constitutional infirmities. (*Id.* at p. 892; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436.)

In *People v. Turner, supra*, 155 Cal.App.4th 1432, an appeal arising from a judgment of conviction of felony indecent exposure with a prior (§ 314, subd. (1)), the defendant argued that two of the conditions of his probation were unconstitutionally vague and overbroad. One of the conditions prohibited him from possessing sexually stimulating materials or patronizing places where the materials were available. The Third District Court of Appeal held that the prevention of possession of sexually oriented materials by persons such as the defendant promoted the public safety and the defendant's rehabilitation. The appellate court nevertheless found the probation condition inherently imprecise and subjective and modified it to read: " 'Not possess any sexually stimulating/oriented material having been informed by the probation officer that such material is inappropriate and/or patronize any places where such material or entertainment in the style of said material are known to be available.' " (*Id.* at p. 1436).

Applying the principles of *Turner* in this case, we modify probation condition No. 38 to read: "38 Do not view, purchase or possess sexually explicit pictures, magazines, video tapes, or movies, or computer pornography, <u>having been informed by the probation officer that such material is inappropriate</u>, or <u>pictures, magazines, video tapes, or movies,</u>

or computer pornography depicting minors engaged in sexual activity or actors representing themselves to be under the age of 18 engaged in sexual activity."

To the extent appellant claims a violation of his First Amendment rights, we note the Ninth Circuit Court of Appeals has held with respect to a similar First Amendment claim: " '[P]robationers, like parolees and prisoners, properly are subject to limitations from which ordinary persons are free.' (*United States v. Consuelo-Gonzalez* [(9th Cir. 1975) 521 F.2d 259, 265] … [¶] … [¶] The district court did not abuse its discretion in prohibiting [the defendant] from possessing sexually stimulating material as a condition of supervised release …. Prohibiting a [probationer who was convicted of engaging in abusive sexual contact with a child under 12 years of age] from possessing sexually stimulating material is therefore sufficiently related to the goal of 'protect[ing] the public from further crimes of the defendant.' 18 U.S.C. § 3553(a)(2)(C)." (*United States v. Bee* (9th Cir. 1998) 162 F.3d 1232, 1235-1236.)

B. Prohibition of the Possession of Any Dangerous or Deadly Weapon

Condition No. 31 states: "31 Do not possess or control any dangerous or deadly weapons including firearms." Appellant contends this condition is vague and overbroad because objects that are not deadly per se may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. Appellant also contends this probation condition is deficient because it lacks a knowledge requirement.

In *In re R.P.* (2009) 176 Cal.App.4th 562 (*R.P.*), the defendant appealed an order continuing him as a ward of the state based upon a finding that he committed second degree robbery (§ 211). The order imposed a probation condition prohibiting the defendant from possessing any " 'dangerous or deadly weapon.' " The defendant contended the condition was unconstitutionally vague because "any object can be used as a deadly weapon," and thus the condition gave no fair warning as to what might result in a violation. (*R.P., supra,* at p. 565.) The Second Appellate District disagreed, finding the condition sufficiently precise for the probationer to know what was required of him. The

appellate court held a condition is sufficiently precise if its terms have a plain, commonsense meaning, which is well-settled. The court examined legal definitions of "deadly or dangerous weapon," "dangerous weapon," "deadly weapon," and use in a "dangerous or deadly" manner, as found in statutes, case law, jury instructions, and Black's Law Dictionary. The court reviewed the relevant legal definitions in those authorities and found they consistently included the harmful capability of the item and the intent of the user to inflict, or threaten to inflict, great bodily injury. As a result of those well-defined terms, the court concluded the phrase "dangerous or deadly weapon" was clearly established in the law and the "no-dangerous-or-deadly-weapon" probation condition was sufficiently precise for the defendant to know what was required of him. (*R.P.*, *supra*, 176 Cal.App.4th at pp. 566-568.)

The defendant in *R.P.* nevertheless argued that the probation condition could not stand because peace officers might attempt to enforce the condition as a strict liability offense. The appellate court noted a similar argument was raised and rejected by the Supreme Court in *People v. Rubalcava* (2000) 23 Cal.4th 322, in which a defendant claimed section 12020 was unconstitutional because it did not explicitly make an individual's intended use of the object an element of the crime. The appellate court acknowledged the probation condition relating to weapons did raise a concern that it might capture some innocent conduct in the future. However, the court concluded such a concern did not rise to the level of a constitutional violation. The court specifically observed: "Like any other probationer, if R.P. is later charged with violating the 'no-dangerous-or-deadly-weapon' probation condition, he is free to contend the item is not a deadly or dangerous weapon under the specific circumstances of the alleged violation." (*R.P.*, *supra*, 176 Cal.App.4th 562 at p. 569.)

The appellate court ultimately concluded that "dangerous or deadly weapon" has a plain common-sense meaning sufficient to put defendant on notice of the conduct prohibited by the probation condition at issue. The court further observed: "The only

reasonable reading of the condition is that it prohibits R.P. from possessing any item specifically designed as a weapon. The condition also limits R.P.'s possession of any item not specifically designed as a weapon – R.P. is barred from possessing any item belonging to this latter category if he intends to use the item to inflict or threaten to inflict death or great bodily injury." (*R.P.*, *supra*, 176 Cal.App.4th at p. 570.)

Appellant's probation condition No. 31 is virtually identical to that in *R.P.*, with the exception that appellant's condition specifically refers to the possession of "firearms," a term that appellant does not contest or question. In view of the reasoning of the court in *R.P.*, the probation condition in this case is sufficiently precise to inform appellant of the prohibited conduct. As to the allegedly missing "knowledge" requirement, the Sixth Appellate District has thoughtfully held in an appeal arising from a judgment of conviction of felony battery causing great bodily injury (§§ 242, 243, subd. (d), 1192.7): "Implicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm. We believe the same is true of a probation condition prohibiting possession of a firearm, and, by logical extension, possession of ammunition." (*People v. Kim* (2011) 193 Cal.App.4th 836, 846.)

The superior court was not required to add a knowledge requirement to condition No. 31 in this case.

C. <u>Failure to Include a Knowledge Requirement in Condition Nos. 35, 36, 37</u>

Condition Nos. 35, 36, and 37 stated:

> "35 Do not initiate, establish or maintain contact with any minor child or reside with any children without prior Court order.
>
> "36 Do not frequent places where children congregate, such as parks, playgrounds, schools video arcades, without the prior approval of the Court or the Probation Officer.
>
> "37 Do not obtain employment which would allow unsupervised contact with minors, and do not reside within a 2000 foot radius o[f] any school attended by minors." !(CT 196)!

Respondent concedes that condition No. 35 should be modified to include a knowledge requirement and agrees with appellant that the condition should read: "Do not knowingly initiate, establish or maintain contact with any minor child or knowingly reside with any children without prior court order."

As to condition No. 36, the Second Appellate District has provided guidance in *People v. Delvalle* (1994) 26 Cal.App.4th 869 (*Delvalle*). In *Delvalle,* the defendant appealed an order granting probation following his conviction of two counts of attempting to buy a person (§ 181). The superior court granted probation subject to a number of conditions, including the condition that defendant " 'stay away from the victim in this case and also stay away from any places where minor children congregate. [¶] The obvious places that come to mind are elementary schools, day care, parks. [¶] Stay away from places where young children are around.' " (*Delvalle*, *supra*, at p. 878.) On appeal, defendant argued the condition should be stricken because it forbade noncriminal conduct and violated his rights to free association and due process of law in that it was vague and ambiguous. The appellate court held the condition was directly related to the crime alleged against defendant in that his multiple attempts to purchase a child centered on her presence at school. The condition was reasonably related to future criminality in that places where minor children congregate constituted a probable situs at which defendant might duplicate his offenses. (*Id.* at p. 879.)

The appellate court further acknowledged that conditions of probation impinging on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. The court held: "Here … the state has a compelling interest in the protection of children which justifies the restriction on Delvalle's freedom of association. Nor is the condition overbroad as the trial court indicated by example the restriction applied to such places as elementary schools, day-

care centers and parks. As no overbreadth or ambiguity appears, the condition properly was imposed." (*Delvalle*, *supra*, 26 Cal.App.4th at p. 879.)

Condition No. 36 is sufficiently precise for appellant, as a probationer, to know what is required of him and for the court to determine whether or the not the condition has been violated. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The condition need not be modified by adding a knowledge requirement.

As to condition No. 37, respondent acknowledges that it conceded a similar argument in *People v. Barajas* (2011) 198 Cal.App.4th 748, 761, footnote 10 (*Barajas*). Respondent nevertheless submits that this court need not add a knowledge requirement to condition No. 37. In *Barajas*, the defendant pleaded no contest to assault with a deadly weapon with personal use of a dangerous and deadly weapon and personal infliction of great bodily injury (§§ 245, subd. (a)(1), 667, 1192.7, 12022.7). He was placed on probation subject to a number of conditions, including one that stated: "You're not to be adjacent to any school campus during school hours unless you're enrolled in or with prior permission of the school administrator or probation officer …." (*Barajas*, *supra*, at p. 760.) The defendant challenged this condition on appeal as impermissibly vague and constitutionally overbroad. The Attorney General suggested, and the Sixth District Court of Appeal agreed, that the condition should be modified to state: "Do not knowingly be on or within 50 feet of a school campus during school hours unless enrolled or with prior administrative permission or prior permission of the probation officer." (*Id.* at pp. 761-762, fn. omitted.)

In this case, respondent maintains that condition No. 37 is not overbroad because it does not unreasonably infringe on a constitutional right. Respondent explains: "[A]ppellant cannot obtain employment as a school teacher or a daycare provider because these jobs would put him in a place where everyone knows minors congregate and would therefore pose the same safety concerns as allowing him to frequent schools and parks.

These conditions do not need scienter requirements because it is highly unlikely – maybe even impossible – for appellant to violate them unknowingly."

To ensure consistency with the rule of *Barajas*, clarity in the conditions of appellant's probation, and a firm constitutional standard for his compliance in the future, we will direct the modification of condition No. 37 to read: "37 Do not knowingly obtain employment which would allow unsupervised contact with minors, and do not knowingly reside within a 2000 foot radius on any school attended by minors."

DISPOSITION

The judgment of conviction is affirmed. The superior court is directed to modify the following conditions of probation to incorporate the underscored language:

"37 Do not knowingly obtain employment which would allow unsupervised contact with minors, and do not knowingly reside within a 2000 foot radius on any school attended by minors."

"38 Do not view, purchase or possess sexually explicit pictures, magazines, video tapes, or movies, or computer pornography, having been informed by the probation officer that such material is inappropriate, or pictures, magazines, video tapes, or movies, or computer pornography depicting minors engaged in sexual activity or actors representing themselves to be under the age of 18 engaged in sexual activity."

The superior court is further directed to amend its order granting probation accordingly and to transmit certified copies of the amended order to all appropriate parties and entities. The order granting probation is affirmed in all other respects.